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Supreme Court of the United States

OCTOBER TERM, 1955

ADELE WEISS,
Petitioner,
against
THE UNITED STATES OF AMERICA,
Respondent.

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above entitled case on October 24, 1955.

Opinions Below

The opinion of the District Court (R. 5) was not reported. The Per Curiam opinion of the Court of Appeals (Pet. pp. 23, 24, R. 39) was not reported when this petition was filed.

Jurisdiction

The judgment of the Court of Appeals was entered on October 24, 1955 (R. 40). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

(1) Where the Government, having accepted the premiums of a class of veterans for insurance equal to the face value of the policy, became obligated by contract to give them such insurance while their premiums remained

in the Fund in the status of premiums and/or until they were withdrawn and allocated to dividends and/or a regulation was promulgated modifying this obligation, and these veterans having died before their premiums were withdrawn and allocated to dividends and before the Administrator promulgated a regulation modifying this obligation with the result that this obligation to give these veterans insurance equal to the face value of the policy for their premiums became a vested property right, may the Government now avoid this obligation?

(2) Where the Government cannot produce any regulation as to the disposition of the reserve in the policy and where Section 605(a) [1] of the Act makes this reserve "• • • available for the payment of liabilities • • •" until it is withdrawn from the Fund and allocated to dividends, with the result that this class of veterans were compelled to and did pay their contributive share of the liabilities that were charged against the Fund until the declaration of dividends, and having died before the declaration of dividends—they paid all the premiums required to the dates of their death pursuant to this mutual contract of insurance, may the Government now avoid payment of these claims?

(3) Where in an action on behalf of a class of beneficiaries of deceased veterans it is alleged that the formula used to compute the special dividend will establish that all that was required pursuant to this mutual contract was that these veterans pay their contributive share of the mortality liabilities that were charged against the Fund until the dates of their death (R. 14-17), and where the Courts have denied these beneficiaries all means of obtaining these facts (R. 30), were these beneficiaries denied the equal protection of the law upon a dismissal of a complaint which also requested judgment directing the Government to disclose these facts?

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[1] Pet. p. 3.

(4) Where these beneficiaries have been denied the most elementary rules of fair civil procedure in their efforts to obtain the facts in the case (R. 30), may their veteran's attorney (R. 9) be personally penalized with costs under 28 U. S. C. Sec. 1927, for his continued efforts to see that they are granted the equal protection of the law?

(5) Where an action is brought to vacate three judgments upon the grounds specified under Rule 60(b), may the Government now interpose these judgments under attack as a defense of res judicata?

Statutes and Regulations Involved

Sec. 605(a) of the Act, 38 U. S. C. A., Sec. 805(a), provides:

> "There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator."

Title 28, Section 1927 U. S. C., provides: Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case so as to increase costs unreasonably and vexatiously may be required by the Court to satisfy personally such excess costs.

Sec. 602(f) (38 U. S. C. A. 803(f)), App. R. 32, 33. Public Law 36—82nd Congress, Chapter 94—1st Session, H. R. 321, Act, May 18, 1951, C. 94, 65, Stat. 44 R. 33. Appendix Pet. p. 26.

38 C. F. R. 8.26, F. R. Sept. 16, 1948, p. 5399, Vol. 13, No. 181, App. R. 34, Appendix Pet. p. 27.
38 C. F. R. (1947 Supp.) 10.3426, F. R. April 1, 1947, p. 2129, Vol. 12, No. 64, App. R. 35, Pet. p. 28.
38 C. F. R. (1949) Sec. 8.16, App. R. 35, Pet. p. 28.
38 C. F. R. (1949 Supp.) Sec. 8.26(a), App. R. 35, Pet. p. 28.

Statement

Petitioner shall indicate why it was necessary to bring this fourth action on behalf of this class of beneficiaries to vacate the three prior judgments upon the grounds specified under Rule 60(b) [1] and pursuant to Rule 18, for the proceeds of these certificates.

The veteran herein is one of a class of veterans who, while in service, took out two certificates of level premium term National Service Life Insurance. The veteran died on August 27, 1948. The Government disclaimed liability stating that the certificates had lapsed on March 31, 1947.

In the first case the Court below stated (*Weiss* v. *U. S.*, 187 F. 2d 610, 612 (Pet. p. 16):

> "* * * she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured. * * *"

Plaintiff's complaint was dismissed for failure to state a claim, a motion to amend was denied, and a motion

[1] Federal Rule 60(b). Relief from Civil Judgments, 61 Yale Law Journal 76, 78.

"• • • compelling the delivery of certain regulations • • •" (187 F. 2d 610, 611) (Pet. p. 14) was also denied (92 F. Supp. 322, 325; affd. 187 F. 2d 610; cer. den. 342 U. S. 820; rehearing den. 342 U. S. 872; 2d rehearing den. 342 U. S. 915).

As plaintiff never predicated her claim upon dividends the Government, in its arguments, both in this Court and in the Court below, avoided and distorted the facts so as to bring the claim within regulations applicable to dividends.

On November 26, 1951, plaintiff brought a second action for relief based upon the grounds specified under Rule 60(b) and alleged, as the Court stated (*Weiss* v. *U. S.*, 103 F. Supp. 470, 472, 473; affd. on opinion below 199 F. 2d 454; cer. den. 344 U. S. 934; rehearing den. 345 U. S. 914) (Pet. p. 20):

> "Plaintiff's pending complaint alleges • • •; that this reserve was 'charged toward the payment of liabilities' under the National Service Life Insurance Fund; that the credits due to Eugene Morse out of the premiums he paid prior to March 31, 1947, were used by the defendant in paying his 'distributive and/or contributive share" of the liabilities charged to the Fund; that by reason of such credit being subject to the 'risk and/or liability' of the Fund, a 'vested' right was created which became fixed upon the veteran's death; and, therefore, that there was a 'vested property right' in the veteran to receive the full value of the policies, since the credits to which he was entitled exceeded the amount of the premiums he was required to pay between March 31, 1947 and his death on August 27, 1948. • • •"

In her affidavit in opposition to a motion for summary judgment plaintiff incorporated by reference the answers to requests for admissions and an interrogatory as "• • • facts essential to justify his opposition • • •" (Rule 56f, R. 25). The District Court granted the Government's motion and denied the motions to direct the Government

to answer and to strike out the defense of res judicata (R. 25). The Court below affirmed on the opinion of the District Court (103 F. Supp. 470; affd. 199 F. 2d 454; cer. den. 344 U. S. 934; rehearing den. 345 U. S. 914).

Both in this Court and the Court below the Government again avoided and distorted the facts so as to bring the claim within regulations applicable to dividends.

In the Supreme Court in the first action the Government stated at page 9 of its brief:

> "* * * His policies, therefore, had no reserve which could then have been used to buy extended term insurance. * * *"

On March 19, 1953, plaintiff brought a third action for relief based upon the grounds specified under Rule 60(b) alleging inter alia that the Government was withholding facts which would conclusively establish that these veterans paid all the premiums required pursuant to this mutual contract.

The Government moved for summary judgment. Plaintiff made a motion to direct the Government's examination before trial after it had been duly served with a notice and to strike out the defense of res judicata. In her affidavit in opposition, plaintiff incorporated by reference the testimony of this examination as "* * * facts essential to justify his opposition * * *" (Rule 56f, R. 25, 26). The District Court granted the motion for summary judgment and denied plaintiff's motions. The Court below affirmed on the opinion of the District Court (207 F. 2d 502; cer. den. 346 U. S. 924; rehearing den. 347 U. S. 908).[1]

In the Supreme Court the Government again avoided the facts by referring this Court to the arguments in the prior actions where the facts were distorted, and at page 5 of its brief stated:

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[1] Pet. p. 22A.

> "* * * Her present complaint * * * stated * * *, that the policies had a reserve at the time that the veteran made his last payment in March 1947 which could have been applied to keep them in force until the date of the veteran's death. * * *"

Allegation "34" of the complaint in the third action, which was incorporated inter alia as allegation "45" (R. 15) in the present complaint further indicates how the Government distorted the facts:

> "34. That by reason of the defendant receiving, retaining and applying the provision of Section 605(a) of the Act to compel the veteran herein to pay his contributive and/or distributive share of the payments and/or liabilities that were charged against the Fund while the premiums remained in the status of premiums from March 31, 1947, to a date beyond the death of the veteran, it recognized that the policyholder had the power to prepay it to the extent of the premiums in its possession."

On February 19, 1954, plaintiff brought the present action to vacate the former judgments upon the grounds specified under Rule 60(b) and other relief and alleged inter alia (R. 13):

> "33. * * * the Administrator * * * failed to promulgate any regulation as to the disposition of the aforesaid reserve in the status of premiums during the lifetime of the veteran or before dividends were declared."

The present complaint also alleges that the Government is withholding facts which would conclusively establish that these certificates never lapsed and requests judgment directing the Government to disclose same (R. 16, 17). The Courts have denied plaintiff all means of obtaining the facts (R. 30).

The importance of the questions presented is further indicated in that they were brought up several times in the 81st and 82nd Congress (R. 29, 30).

In the first action the Government stated at page 6, footnote of its brief in the Supreme Court (R. 30):

> "A bill, H. R. 3551, was introduced in the 81st Congress which would have amended the statute to bring about the result for which petitioner contends. That bill was never reported out of committee."

Congress, after notice of these claims, avoided them when they amended Section 602(f) of the Act[1] and erased the regulations sustained as a defense to these actions which provided that dividends shall be paid in cash by making Public Law 36 of the 82nd Congress effective January 1, 1952 (R. 33 Pet. p. 26).

This class of beneficiaries, having been by-passed by Congress, forsaken by the Government and the Courts below having denied them all means of presenting the true facts (R. 30) and refusing to decide this case upon the facts as alleged in the complaint, respectfully ask this Court for an adjudication.

Reasons For Granting the Writ:

The regulations sustained as a defense in the former actions are not applicable to the present facts; that is why the Government avoids and distorts the facts.

As to the first regulation (Appendix R. 35),[2] the Court below stated (*Weiss* v. *U. S.*, 187 F. 2d 610, 611)[3]:

> "* * * If any premium be not paid when due, the * * * policy shall cease and become void, except as otherwise provided in the policy."

It is not now disputed that upon default of these veterans' premium payments they had on deposit to their credit in

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[1] (Appendix R. 32, 33; Pet. pp. 25, 26.)

[2] (Appendix Pet. p. 28) (38 C. F. R. (1949) Sec. 8.16.)

[3] Pet. p. 15.

the Fund a reserve based upon unearned premiums which was more than sufficient to pay the gross flexible premiums to the dates of their death. Therefore to "void" this reserve would be in violation of the Fifth Amendment. The Government, having accepted these premiums for insurance equal to the face value of the policy, became obligated by contract to give these veterans such insurance while their premiums remained in the Fund in the status of premiums and/or until they were withdrawn and allocated to dividends.

The Administrator could have modified this obligation by the promulgation of a regulation at any time prior to the death of these veterans and/or before the premiums were withdrawn from the Fund and allocated to dividends.

The Administrator, having failed to promulgate a regulation modifying this obligation before the premiums were withdrawn from the Fund and/or before the death of these veterans, the rights of the parties became fixed and vested upon their death (*Jones* v. *Union Central Life Ins. Co.*, 265 App. Div. 388; affd. 290 N. Y. 883; *American National Bank and Trust Co. of Chicago* v. *United States*, 7th Cir., 159 F. 2d 188, 192). This obligation to give these veterans insurance equal to the face value of the policy for their premiums while they remained in the Fund in the status of premiums became a vested property right protected by the Fifth Amendment (*Lynch* v. *U. S.*, 292 U. S. 571, 576).

As this reserve remained in the Fund in the status of premiums until dividends were declared, it was "* * * available for the payment of liabilities under such insurance * * *" (Sec. 605(a)) (Pet. p. 3). These veterans were therefore compelled to pay and did pay their contributive share of the mortality liabilities that were charged against the fund until this reserve was withdrawn and allocated to dividends, these veterans having died before dividends were declared, until the dates of their death (R. 14, 15, 16, 27).

Applying these facts to the definition of insurance as "Risk Distribution" (*Helvering* v. *LeGierse,* 312 U. S. 531, 539) and "Equality of Risk", these veterans were never required to pay a higher premium than their contributive share of the liabilities that were charged against the Fund until their death, therefore these certificates never lapsed (R. 16).

Thus, if the mortality table used or the plan (converted policies) require higher premiums, the unearned premiums and the reserve are proportionately increased but these veterans were never liable for more than their contributive share.

The foregoing indicates that the risk to pay for the liabilities that were charged against the Fund until the dates of the death of these veterans and/or until dividends were declared is now placed upon those veterans who had premiums on deposit to their credit in the Fund without any risk on the part of the Government. The only way that there can be a mutuality of risk, and for the Administrator to avoid the taking of property without due process, is to have a mutuality of obligation and to give these veterans what they paid for, namely, insurance equal to the face value of the policy for their premiums.

The other three regulations sustained as a defense in the former actions are inapplicable to the present facts as plaintiff *never* predicated her claim upon dividends (*that is why the Government found it necessary to distort the facts in answering the first three petitions*) and these regulations require that dividends be paid in cash.

The Court below stated (187 F. 2d 610, 612) (Pet. pp. 15, 16):

> "* * * A regulation promulgated in the Spring of 1949, 38 C. F. R. 1949 Ed., Sec. 8.26(a), provided: Any special National Service Life Insurance dividend that may be declared shall be paid in cash only * * *."

The insured died August 27, 1948 (R. 9); the first action was commenced on March 2, 1949 (R. 29). This regula-

tion appeared in the Federal Register on May 28, 1949 (R. 29) (14 F. R. 2832) (Appendix R. 35, Pet. p. 28).

The other two regulations relied on by the Court below also provided that dividends shall be paid in cash, 38 C. F. R. 1949 Ed. 8.26 (Appendix R. 34) [1] and 38 C. F. R. 1949 Ed. Sec. 10.3426 (Appendix R. 35).[2] These two regulations also provided "* * * will be used in addition to the reserve in the policy for the purpose of computing the period of extended term insurance * * *." As the Government used the words "reserve" and "dividends" in the same paragraph it intended each to have a different meaning.

Public Law 36 of the 82nd Congress, effective January 1, 1952 (Appendix R. 33),[3] erased the aforesaid regulations which provided that dividends shall be paid in cash without the written consent of the policyholder.

If the Court may deprive these beneficiaries of their "* * * property without due process of law; * * *" because of "* * * a necessary bookkeeping development * * *" (*Weiss* v. *U. S.*, 187 F. 2d 610, 612) (Pet. p. 17) in violation of the Fifth Amendment the next in line would be "* * * life, liberty * * *."

Was there ever a case in the history of our country where only one party was bound by the obligation of the contract?

This was the first case to decide this important question (R. 31). The beneficiary alleged that she and the insured duly complied with all the conditions of the contract including the prepayment of premiums to the date of the death of the insured veteran (R. 16, 17). Was there ever another case where the Courts have denied a beneficiary of all means of obtaining the facts (R. 30)?

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[1] Pet. p. 27.

[2] Pet. p. 28.

[3] Pet. p. 26.

The Court below now states that any "* * * further vexatious litigation * * * will subject counsel personally to the costs * * *" (Pet. p. 24).[1]

In the Court below we stated at page 6 of our brief:

> "This entire case can be concluded by an Actuary answering the following: Assuming that these veterans had paid their gross flexible premiums until the dates of their death, could they have been charged with a greater amount than their contributive share of the mortality liabilities that were charged against the 'Fund' until the dates of their death?"
>
> *Suppressio veri, expressio falsi.*
>
> "A man who is good enough to shed his blood for his country is good enough to be given a square deal afterward. More than that no man is entitled to, and less than that no man shall have." Theodore Roosevelt.

CONCLUSION

As the Government has no defense to the claims of these beneficiaries, it found it necessary to withhold, avoid and distort the facts in answering the first three petitions.

For the foregoing reasons and upon the grounds specified under Rule 60(b) this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY MORSE,
Attorney for Petitioner.

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[1] These beneficiaries of deceased veterans whose lives were shortened due to service to their country, having been denied the equal protection of the law (R. 30), are now denied the right to counsel.

APPENDIX A

Reported at 187 F. 2d 610.

[Same Title.]

Before:

Augustus N. Hand, Chase and Clark, *Circuit Judges.*

Clark, *Circuit Judge:*

The plaintiff, Adele Weiss, is the sister of a veteran Eugene Morse who, while serving in the Armed Forces of the United States, took out two certificates of level premium term National Service Life Insurance, each for $5,000, naming her as beneficiary. He was honorably discharged on December 7, 1945, and died on August 27, 1948, having failed to pay the premiums after March 31, 1947—a period of some seventeen months. She brought suit for the proceeds, the government moved for a dismissal on the ground that, as the complaint disclosed, the insurance had lapsed, and the district court granted the motion. She now appeals. There is no dispute in these underlying facts and the case is to be decided upon the basis of the governing statute and the regulations issued thereunder. The plaintiff does not deny, indeed herself pleaded, the non-payment of the premiums; rather for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums or undeclared dividends sufficient and effective for the purpose or (2) the insured's total disability for injuries during the period and consequent waiver of the premiums as provided by law. The government's defense is that the regulations issued pursuant to law explicitly prohibit such an interpretation [fol. 43] of the obligations which were placed upon it in the issuance of veterans' insurance.

In accord with the district judge we think this defense complete and unanswerable and regard the plaintiff's con-

tention as based upon a form of governmental contract which, however equitable it might be considered, would be distinctly other than was actually proffered. The learned judge first wrote a reasoned opinion and then a supplemental opinion after he had given opportunity to the parties to submit later rulings, if any, of the Administrator of Veterans' Affairs, 92 F. Supp. 322. We agree with his rationale and find little more to say. Before turning to the statute and regulations, we may note that the appeal is in form from four district court orders; the dismissal of the complaint for failure to state a claim upon which relief can be granted, the denial of a motion for reargument, the denial of leave to amend, and the denial of an order compelling delivery of certain regulations to the plaintiff. The second and third appeals are but iterations of the main point of law to which we shall now address ourselves. As to the fourth, whether or not there was any improper denial to plaintiff of the governing literature of the case, we now have all the material presented to us and this particular side issue has obviously become moot.

The National Service Life Insurance Act, passed in 1940, provided for the granting to persons in active service, upon application and payment of premiums, of insurance on the five-year level premium term plan. 38 U. S. C. A. § 802(a). The Act went on to provide, *inter alia*, for the setting of premium rates upon "the net rates based upon the American Experience Table of Mortality and Interest at the rate of 3 per centum per annum, § 802(e); for the privilege of conversion of the term insurance into other plans upon payment of the difference in reserve within the five-year-term period, § 802(f); for the establishment of a [fol. 44] permanent trust fund in the United States Treasury, known as the National Service Life Insurance Fund, to receive the premiums paid in, together with interest, to be available "for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made

upon and in accordance with awards by the Administrator." § 805(a); and for the power to the Administrator "to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes," § 808.[1] Regulations, 38 C. F. R., 1941 Supp., §§ 10.3414-10.3416, provided for grace periods of 31 days for the payment of any premium, cited the method of computation of the period, covering such matters as its expiration on Sunday or a legal holiday, and concluded in 10.3416: "If any premium be not paid when due, the National Service Life Insurance policy shall cease and become void, except as otherwise provided in the policy."

With respect to dividends the Act in the subdivision cited above providing for conversion into other form of life policies then stated: "All five year level premium term policies shall cease and terminate at the expiration of the five year term period. Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable, may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator." § 802 (f). No dividends were, however, declared for many years. Indeed this delay in the declaration of dividends is made [fol. 45] one of the grounds of complaint by the plaintiff. It was explained by defendant on the ground that for the duration of the war the government's liability could not be accurately determined and thereafter it was placed in doubt by the decision in *Zazove* v. *United States*, 7 Cir., 162 F. 2d 443, which threatened to enlarge it "by billions" until reversal on June 14, 1948, in *United States* v. *Zazove*, 334 U. S. 602. A regulation promulgated in the spring of 1949, 38 C. F. R., 1949 Ed., § 8.26a, provided: "Any special

[1] Several of the provisions cited here and below have been expanded or elaborated by amendments, notably in 1946 and 1947; since the changes do not affect the substance of the issues here involved, citation of detail appears unnecessary.

National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums." An earlier regulation, 38 C. F. R., 1949 Ed., § 8.26, had provided that dividend accumulations and unpaid dividends should not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium—a request, of course, never made by this insured.[1] The plaintiff discounts these clear indications of administrative policy by saying that she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid-up policies for a period beyond the time of the death of the insured. This [fol. 46] theory appears to have been developed because of the Administrator's present program of paying certain dividends in cash upon all policies, even those which had lapsed. In view of this there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible. Be that as it may, we do not see how that can be made a compulsion upon the government when the regulations under the statute, having the force of law because quite consistent with it, are so obviously based on the contrary principle. Provisions as to lapse are necessary if the scheme of requiring pre-

[1] See also the provisions of 38 C. F. R., 1947 Supp., § 10.3426 that dividends "will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance"—a distinction made between different types of insurance which is carried into §§ 10.3428-10.3430.

miums from the veterans for their insurance is to be given any force at all. The further restriction upon the use of dividends is a natural and perhaps a necessary bookkeeping development under the circumstances under which dividends were contemplated and were eventually granted. Presumably the Administrator could not have undertaken the responsibility of declaring dividends even when he did if his act was to have the effect of reviving innumerable policies already lapsed. Nor is there anything apparent in the legislation requiring the earlier declaration of dividends while the liability of the government was thus inchoate. The cases arising after World War I, and to date after the last war, seem quite clear that payments, including dividends, on veteran policies are to be only as the governing regulations provide and that the United States cannot be held estopped into other or greater payments. *United States* v. *Huie*, 5 Cir., 73 F. 2d 305; *James* v. *United States*, 4 Cir., 185 F. 2d 115; *United States* v. *Norton*, 5 Cir., 77 F. 2d 731; *Wilber Nat. Bank of Oneonta, Adm'r*, v. *United States*, 294 U. S. 120. Several recent unreported cases in the district courts have also been cited to us. We have therefore no doubt but that the plaintiff's contention cannot be supported.

[fol. 47] Her second ground of suit, namely, that the insurance was in force at the insured's death because of waiver of premiums for disability, stands in no better shape. The allegations of the complaint fall far short of meeting the conditions set in the Act itself, § 802(n) as amended, of continuous total disability of the insured, "which continues or has continued for six or more consecutive months" subsequent to his application and "while the insurance was in force under premium-paying conditions," and of application by the insured within the times specified. These conditions are not in any way removed or nullified by the provisions of § 807(b) for the bearing of the cost by the United States beyond the amount of reserve of the policy.

Affirmed.

APPENDIX B

Reported at 103 F. Supp. 470, affd. on opinion below 199 F. 2nd 454.

OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINT.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

GALSTON, D. J.

This is a motion for an order granting the defendant summary judgment and dismissing the complaint.

The action brought by the plaintiff is one to recover the proceeds of two certificates of level premium term National Service Life Insurance. The policies were issued to one Eugene Morse while he was serving in the Armed Forces. The plaintiff, his sister, is named as the beneficiary in the policies. Eugene Morse died on August 27, 1948, subsequent to his honorable discharge.

An earlier action for recovery under these two policies of insurance was dismissed on the ground that the policies had lapsed because of the failure of the insured to pay premiums after March 31, 1947, Weiss v. United States, 92 Fed. Supp. 322, aff'd 187 Fed. (2d) 610, cert. den'd, 342 U. S. 820. One of the theories upon which the plaintiff sought to recover, as appears in the opinions of the Court of Appeals and the District Court, supra, was that the government's failure to declare dividends created an insurance reserve which could have been applied to the policies of insurance for payment of the premiums from March 31, 1947 until the date of the insured's death. This theory was rejected.

In the earlier decisions, supra, it is pointed out that the plaintiff pleaded non-payment of premiums after March 31, 1947. The plaintiff's new complaint is silent as to payment or non-payment of premiums. Paragraphs 9 and 10 of the new complaint allege:

> "9. Upon information and belief, that by mutual mistake of the plaintiff and defendant that the aforesaid policy had lapsed, or by the mistake of the plaintiff and the concealment of the fact by the defendant that the above entitled policy had not lapsed, in remaining silent when it was under a duty to disclose this fact, and/or the misrepresentation of the defendant as will hereinafter be alleged, the plaintiff herein, ignorant of the true facts, did incorrectly bring an action against this defendant on the aforesaid certificate on March 2, 1949.
>
> "10. Upon information and belief, that the aforesaid complaint did not state all the facts. That some time subsequent to the service of the aforesaid complaint the defendant herein disclosed certain material facts as will hereinafter be alleged."

The "fact" alleged in the complaint is the declaration of a dividend by the Administrator of Veterans' Affairs on January 16, 1950. It is difficult to see how this fact was "concealed" or "misrepresented" by the defendant; nor is it possible to say that it resulted in a "mutual mistake". What the plaintiff is actually contending by the allegations in her complaint is that this declaration of dividends supports her theory that the policies in question had not lapsed despite the fact that no premiums were paid subsequent to March 31, 1947.

The defendant sets up as affirmative defenses (1) that the certificates of insurance lapsed and were no longer in force and effect on the date of the insured's death because of the failure to pay premiums thereon after March 31,

1947, and (2) the issues are res judicata. In support of this motion, the defendant contends that in filing the present complaint and instituting this second action, the plaintiff is attempting to revive the same claim already decided against her.

Plaintiff's pending complaint alleges that the declaration of dividends in January, 1950, including dividends upon premiums paid to March, 1947, by Eugene Morse, indicates the existence of a reserve prior to the declaration; that this reserve was "charged toward the payment of liabilities" under the National Service Life Insurance Fund; that the credits due to Eugene Morse out of the premiums he had paid prior to March 31, 1947, were used by the defendant in paying his "distributive and/or contributive share" of the liabilities charged to the Fund; that by reason of such credit being subject to the "risk and/or liability" of the Fund, a "vested" right was created which became fixed upon the veteran's death; and, therefore, that there was a "vested property right" in the veteran to receive the full value of the policies, since the credits to which he was entitled exceeded the amount of the premiums he was required to pay between March 31, 1947 and his death on August 27, 1948. It is also alleged that the attempt to return part of the excess payment of premiums at a subsequent date in the form of dividends could not take away this "vested" right.

Judge Clark's opinion affirming the dismissal of the plaintiff's first complaint, is a sufficient answer to these contentions. In Weiss v. United States, supra, at page 612, he states:

> "Her (plaintiff's) contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid-up policies for a period beyond the time of the death of the insured. This

theory appears to have been developed because of the Administrator's present program of paying certain dividends in cash upon all policies, even those which had lapsed. In view of this there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible. Be that as it may, we do not see how that can be made a compulsion upon the government when the regulations under the statute, having the force of law because quite consistent with it, are so obviously based on the contrary principle. * * * Presumably the Administrator could not have undertaken the responsibility of declaring dividends even when he did if his act was to have the effect of reviving innumerable policies already lapsed. Nor is there anything apparent in the legislation requiring the earlier declaration of dividends while the liability of the government was thus inchoate. The cases * * * seem quite clear that payments, including dividends, on veteran policies are to be only as the governing regulations provide and that the United States cannot be held estopped into other or greater payments. * * * We have therefore no doubt but that the plaintiff's contention cannot be supported."

The plaintiff fails to point to any statute or regulation enacted or promulgated subsequent to her first action which would support her theory. Subsection (f) of Section 803 of Title 38, U. S. C. A. was amended by Act, May 18, 1951, c. 94, 65 Stat. 44, to include the following:

"Provided further, That until and unless the Veterans' Administration has received from the insured a request in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952."

This amendment, however, does not help the plaintiff as it is applicable by its terms only to premiums becoming due and dividends payable after January, 1952.

What is important and necessary for the plaintiff to support her claim, as indicated by the Court of Appeals, is to show some statute, or regulatory basis within the framework of the statute, for the right to look to some insurance reserve to remedy the failure to pay required premiums; how or why a reserve was allowed to accumulate by the government is not material here.

Since the plaintiff has had her day in court to prove her theory, this motion is granted. Settle order.

GALSTON,
U. S. D. J.

THIRD ACTION

Memorandum Opinion (Not Reported).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

GALSTON, J.:

However one may read the present complaint the compelling inference is that the plaintiff is entitled to no relief. The reasons therefor are abundantly set forth in two decisions of this court with affirmance by the U. S. Court of Appeals in the consideration of two prior complaints. 92 Fed. Supp. 322, 187 Fed. 2d 610, 103 Fed. Supp. 470, 199 Fed. 2d 454 and certiorari denied in both cases. The policies lapsed and have not been revived by any subsequent legislation. Motion granted. Settle order.

May 14, 1953.

CLARENCE G. GALSTON,
U. S. D. J.

Affirmed on opinion below

Weiss v. *United States,* 207 F. 2d 503 Cer. Den. 346 U. S. 924.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1955

Argued October 3, 1955 Decided October 24, 1955

[SAME TITLE.]

Before:

CLARK, *Chief Judge,* and MEDINA and LUMBARD, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, ROBERT A. INCH, *Judge.*

Plaintiff appeals from a summary judgment for defendant in her action to recover upon two policies of National Service Life Insurance, to vacate certain previous judgments against her, and for other collateral relief.

Per Curiam:

This is plaintiff's fourth attempt to collect the proceeds of two policies of National Service Life Insurance, wherein she had been named as beneficiary by her brother a veteran who died in 1948. The policies had lapsed for non-payment of premium before the insured died, and in our first decision we tried at some length to explain why plaintiff's involved intention that the policies were kept alive by some supposed reserve built up contrary to government practice and regulations could not be accepted. Weiss v. United States, 2 Cir., 187 F. 2d 610 (affirming D. C., E. D. N. Y., 92 F. Supp. 322), certiorari denied 342 U. S. 820. A second and third case brought ostensibly under F. R. 60(b) upon

some variations in this fundamental thesis resulted also in judgments for the defendant. Weiss v. United States, 2 Cir., 199 F. 2d 454 (affirming 103 F. Supp. 470), certiorari denied 344 U. S. 934; Weiss v. United States, 2 Cir., 207 F. 2d 503, certiorari denied 346 U. S. 924. Once more we have the same attempt, based on some alleged further variation in theory, so slight as to be perceived only with difficulty and in no event at all undermining the final adjudication so often and so decisively made. We are reluctant to take steps which may seem harsh against a veteran's beneficiary, no matter how weak her claim; but further vexatious litigation to reopen this hopeless case will subject counsel personally to the costs thereof, as provided in 28 U. S. C. Sec. 1927.

Affirmed.

APPENDIX D

Sec. 602(f) (38 U. S. C. A. 803(f))

Act of Oct. 8, 1940, as amended by sec. 3, Public Law 589, 79th Cong. Aug. 1, 1946, by sec. 2, Public Law 5, 80th Cong., Feb. 21, 1947, and by Public Law 838, 80th Cong., June 29, 1948.

(f) Such insurance may be issued on the following plans: Five-year level premium term,[16] ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled. All level premium term policies, except as provided below, shall cease and terminate at the expiration of the term period: *Provided,* That at the expiration of the term period any national service life insurance policy which was issued on a five-year level premium term plan before January 1, 1948, and which has not been exchanged or converted to a permanent plan of insurance, may be renewed as level premium term insurance for an additional period of five years at the premium rate for the then attained age without medical examination, provided, the required premiums are tendered prior to the expiration of the first term period: *Provided further,* That in any case in which the insured is shown by evidence satisfactory to the Administrator to be totally disabled at the expiration of the level premium term period of his insurance

[16] The 5-year term policies issued prior to December 31, 1945, were extended for an additional period of 3 years. (See appendix, Public Law 118, 79th Cong.)

under conditions which would entitle him to continued insurance protection but for such expiration, such insurance, if subject to renewal under this provision, shall be automatically renewed for an additional period of five years at the premium rate for the then attained age, unless the insured has elected insurance on some other available plan. Provision for cash, loan, paid-up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

Public Law 36—82d Congress, Chapter 94—1st Session
H.R. 321, Act May 18, 1951, c. 94, 65 Stat. 44

AN ACT

To provide that on and after January 1, 1952, dividends on national service life insurance shall be applied in payment of premiums unless the insured has requested payment of dividends in cash.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 602(f) of the National Service Life Insurance Act of 1940, as amended, is hereby amended by substituting a colon for the period at the end thereof and adding the following: *"Provided further,* That until and unless the Veterans' Administration has received from the insured a request in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952."

Approved May 18, 1951.

38 C. F. R. 8.26 F. R. Sept. 16, 1948, p. 5399, Vol. 13, No. 181

Sec. 8.26 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' affairs. Any such dividend shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid up insurance as provided in Sections 8.29(a) and 8.30 respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash to the person currently entitled to receive payments under the policy.

38 C. F. R. (1947 Supp.) 10.3426 F. R. April 1, 1947, page 2129, Vol. 12, No. 64

Sec. 10.3426 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds.

(Secs. 601-618, 54 Stat. 1008-1014; 38 U. S. C. 801-818.)

38 C. F. R. (1949) Sec. 8.16 LAPSE FOR NON-PAYMENT OF PREMIUM. If any premium be not paid when due, the National Service Life Insurance policy shall cease and become void, except as otherwise provided in the policy.

38 C. F. R. (1949) Supp. Sec. 8.26(a) SPECIAL DIVIDENDS. Any special National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.